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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME AGUIRRE,

Defendant and Appellant.

B207885

(Los Angeles County  
Super. Ct. No. YA066815)

APPEAL from orders of the Superior Court of Los Angeles County.

Eric Taylor, Judge. Reversed and remanded.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and Susan S. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jaime Aguirre pled guilty to two counts of first degree residential burglary in violation of Penal Code section<sup>1</sup> 459 in case number YA066815 and one count of receiving stolen property in violation of section 496 in case number LA054592. Appellant was sentenced to two years in state prison for the burglary convictions and a concurrent term of two years for the receiving stolen property conviction. In case number LA054592, the receiving stolen property case, the trial court ordered appellant to pay restitution in the amount of \$1,486.33 to Javier Miramontes-Coleneros, \$6,504.15 to Tiffany Lanier and \$7,540 to Mark Keene.

Appellant appeals from the orders imposing restitution, contending that the trial court erred in awarding restitution in case number LA054592 which involved the receiving stolen property convictions. At our request, the parties briefed the issue of whether a second \$20 court security fee should be imposed pursuant to section 1465.8, subdivision (a)(1) in case number YA066815. Respondent contends that appellant's March 17, 2007 notice of appeal was not timely as to the August 17, 2007 restitution order involving Miramontes-Coleneros and Lanier. We agree that appellant's appeal was not timely concerning that order, but we treat the appeal as a petition for writ of habeas corpus raising the issue of ineffective assistance of counsel. We reverse the trial court's orders awarding restitution and remand to the trial court for a new restitution hearing. At that time, the trial court should impose an additional \$20 court security fee.

## Facts

### 1. Case number YA066815

In this case, appellant pled guilty to two burglaries which occurred in October 2006. Appellant raises no claim of error in connection with these convictions.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

## 2. Case number LA054592

Between September 12 and October 26, 2006 the residences of the Miramontes-Coleneros family, Tiffany Lanier and Mark Keene were burglarized. Numerous items of personal property were stolen in each burglary.

On October 26, 2006, Redondo Beach Police Officer Leonard Jordan searched appellant's residence in Reseda pursuant to a search warrant. Laptops belonging to Miramontes-Coleneros, Lanier and Keene were found.<sup>2</sup> No other property belonging to those victims was found in appellant's possession.

Appellant told police that he was holding the laptops for a friend. He acknowledged that he knew they were stolen. Appellant pled guilty to one count of receiving stolen property in this case. As part of his plea agreement, appellant agreed that he would pay appropriate restitution to all three victims.

## Discussion

### 1. Restitution order

Appellant contends that the trial court erred in awarding restitution to Miramontes-Coleneros, Lanier and Keene. Respondent contends that appellant filed his notice of appeal for the order concerning Miramontes-Coleneros and Lanier more than 60 days after the order made by the court, and his appeal from that order must be dismissed.

We agree with respondent that appellant missed the filing deadline for the Miramontes-Coleneros and Lanier order. The issue raised concerning that order is identical to the one raised concerning the Keene order, which is properly before us on appeal. In the interest of judicial economy, we will treat the attempted appeal from that

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<sup>2</sup> On our own motion, we take judicial notice of the transcript of the preliminary hearing in this case, held on May 10, 2007. The original of this transcript is in the superior court's file.

order as a petition for habeas corpus for ineffective assistance of counsel in failing to file the notice of appeal.<sup>3</sup>

The California Constitution provides in pertinent part: "[A]ll persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer." (Art. I, § 28, subd. (b)(13)(A).)

Section 1202.4 provides in pertinent part: "[A] victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime." (Pen. Code, § 1202.4, subd. (a)(1).)

"Courts have interpreted section 1202.4 as limiting restitution awards to those losses arising out of the criminal activity that formed the basis of the conviction." (*People v. Woods* (2008) 161 Cal.App.4th 1045, 1049; see *People v. Lai* (2006) 138 Cal.App.4th 1227, 1246, 1249.)

The Fourth District Court of Appeal has held that a defendant who is convicted of receiving stolen property is only responsible for restitution for stolen property found in his possession. He may not be ordered to pay restitution for items stolen from a victim which are not found in his possession. This is true even when these "missing" items were stolen from the victim at the same time as the items found in his possession. (*People v. Rivera* (1989) 212 Cal.App.3d 1153, 1162.) In *Rivera*, the defendant was observed stealing tools from the garage of Eric Myrmel. When police arrested the defendant, they searched the car he was driving and found tools belonging to Myrmel and also \$800 worth of tools belonging to Mary Swett. The car was later determined to have been stolen. The defendant pled guilty to, inter alia, receiving stolen property belonging to Swett. The trial court ordered the defendant to pay \$1,200 in restitution to Swett for tools which were stolen but not recovered. (*Id.* at p. 1156.) The Court of Appeal found that

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<sup>3</sup> Respondent also contends that appellant forfeited his claim of error concerning this restitution order by failing to object in the trial court. We will consider this claim as part of the habeas corpus petition.

there was no showing that the defendant was responsible for the missing tools taken in the burglary of Swett. (*Id.* at pp. 1161-1162.)

The Fifth District Court of Appeal subsequently summarized the holding of *Rivera* as follows: "[W]here a burglary victim's property, which was the subject of the defendant's conviction for receiving stolen property, had been returned, the [trial] court erred in awarding restitution for items taken in the burglary which were not found in the defendant's possession." (*People v. Baker* (2005) 126 Cal.App.4th 463, 468.)

We agree with the reasoning and holdings of the Fourth and Fifth District Courts of Appeal in *People v. Rivera, supra*, and *People v. Baker, supra*. As a general rule, a defendant who is convicted of receiving stolen property is responsible only for the return of or damages to the stolen property found in his possession. This stolen property may be only a fraction of the property which was stolen from a victim. The defendant, however, is not responsible for any "missing" stolen property, that is property stolen from the victim but not found in defendant's possession. If there is evidence linking the other "missing" stolen property to the defendant, it may, of course, be reasonable to infer that the defendant possessed the property at an earlier time and then disposed of it. There may, for example, be testimony that the defendant was seen in possession of an unusual piece of jewelry that matched the description of a victim's stolen property, or that a burglar had the habit of taking all of his stolen property to the same person for safekeeping or sale. In such instances, restitution for the missing stolen items would be proper.

Here, there is nothing to link appellant to any of the stolen items other than the laptops found in his possession. Respondent contends that appellant is linked to the missing stolen property because each victim's property was stolen during a single burglary of that victim's residence, appellant had possession of some of the victims' stolen property, and he admitted that he was holding that property for a friend. Even assuming for the sake of argument that the friend was the burglar, there is nothing in the facts recited by respondent to support an inference that the friend gave all the property he stole to appellant.

The evidence introduced at Keene's restitution hearing creates an inference that appellant's friend did *not* give appellant all the property he stole in his burglaries. Keene's house was burglarized between 10:45 a.m. and 1:00 p.m. on October 26, 2006. Numerous items were taken in that burglary, including a camera, jewelry, change, clothing, luggage, compact discs, videos, an X-box game console, X-box games, a microphone, a mixer board, a flask, sunglasses and cellphones. Police executed a search warrant of appellant's residence that same day. The only possession of Keene's found by police was a laptop computer. The laptop was broken and several accessories were missing from the laptop case. Given the short amount of time between the burglary and the search of appellant's residence, the most reasonable inference is that the Keene property found in appellant's possession was the only Keene property appellant received, and the friend/burglar placed the remainder of the stolen property elsewhere.

Appellant may only be ordered to pay restitution to Keene for the stolen items found in appellant's possession which were damaged. The damage to the laptop includes accessories which were missing from the laptop case. Appellant may not properly be ordered to pay for items stolen in the burglary of Keene's residence, but not found in appellant's possession. The exact amount awarded for the loss relating to the laptop and accessories is not clear from the record before us. Accordingly, the order awarding restitution to Keene is vacated and this matter is remanded to the trial court for a determination of the amount of loss suffered by Keene in connection with the stolen laptop including the accessories missing from the laptop case.

The restitution orders for Miramontes-Coleneros and Lanier also covered items stolen in the burglaries but not found in appellant's possession. Appellant's counsel stipulated to the amount to be awarded to Miramontes-Coleneros, did not object to the restitution award to Lanier and did not file a timely notice of appeal as to the restitution orders for those two victims. Appellant contends that this constitutes ineffective assistance of counsel. We agree.

Appellant has the burden of proving ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) In order to establish such a claim, appellant must show

that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra*, 466 U.S. at p. 694.)

If appellant's counsel had objected and filed a timely notice of appeal, appellant would have prevailed on his claim of error. As we have just discussed, a defendant who is convicted of receiving stolen property may be ordered to pay restitution only for the damaged stolen property found in his possession. He may not be ordered to pay for all items taken from a victim. Here, the court ordered appellant to pay restitution for all items taken from Miramontes-Coleneros and Lanier when their residences were burglarized.

It is not possible to tell from the record on appeal whether Miramontes-Coleneros's laptop or Lanier's laptop were damaged. Accordingly, we reverse the restitution orders for Miramontes-Coleneros and Lanier and remand this matter to the trial court to determine if those victims' laptops were damaged. If so, appellant may be ordered to pay restitution for that damage. If not, no restitution should be ordered as to those two victims.

## 2. Security fee

In response to a request for briefing from this Court, respondent contends that the trial court erred in failing to impose a second \$20 court security fee pursuant to section 1465.8, subdivision (a)(1) in case number YA066815. We agree. Appellant suffered two burglary convictions in that case, and two security fees should have been imposed. (*People v. Walz* (2008) 160 Cal.App.4th 1364.) We do not agree with appellant that the issue was forfeited by respondent's failure to raise the issue in the trial court. (See *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157; *People v. Turner* (2002) 96 Cal.App.4th 1409, 1413.) This additional fee should be imposed upon remand.

### Disposition

The orders awarding restitution to Javier Miramontes-Coleneros, Tiffany Lanier and Mark Keene are reversed, and this matter is remanded for a determination of the amount, if any, of damages to their laptops which were found in appellant's residence. At the same time, an additional \$20 court security fee pursuant to section 1465.8, subdivision (a)(1) should be imposed in case number YA066815.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.